Supreme Court, U.S.
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No. 96-1617

In The

Supreme Court of the United States

October Term, 1996

PUEBLO OF SANTA ANA, PUEBLO OF SAN JUAN, PUEBLO OF TESUQUE, PUEBLO OF ACOMA, PUEBLO OF SANDIA, PUEBLO OF ISLETA, PUEBLO OF POJOAQUE, SAN FELIPE GAMING ENTERPRISE BOARD, and PUEBLO OF TAOS,

Petitioners,

vs.

JOHN J. KELLY, in his official capacity as United States Attorney for the District of New Mexico; JANET RENO, Attorney General of the United States; BRUCE BABBITT, United States Secretary of the Interior; the UNITED STATES of AMERICA; and the STATE of NEW MEXICO,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF FOR THE STATE OF NEW MEXICO IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether under the Indian Gaming Regulatory Act, 25 U.S.C. §§2701-2721 ("IGRA"), a *post hoc* [sic] challenge to the validity of a state's agreement to an approved tribal-state compact may be adjudicated directly in the courts, or must first be made to the Secretary of the Interior.

2. Whether under IGRA, a tribal-state compact that has been approved by the Secretary of the Interior and that is in effect may be judicially invalidated on the basis of a subsequent court determination that there was a state law defect in the state's agreement to the compact.

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OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1a-33a) is published at 104 F.3d 1549. The opinion of the district court (Pet. App. 35a-67a) is published at 932 F.Supp. 1284.

JURISDICTION

The judgment of the Court of Appeals was entered on January 10, 1997. The petition for writ of certiorari was filed on April 10, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. Errors In Petitioners' Statement

The Petitioners ("Tribes") have misrepresented the decisions below by stating that the District Court ruled that the compacts are invalid based upon the New Mexico Supreme Court decision in *State ex rel. Clark v. Johnson*, 120 N.M. 562, 904 P.2d 11 (1995) ("Clark"). (Pet. 7). In fact, the District Court found that it was not bound by the *Clark* decision and made its own examination of New Mexico's law "independent of the *Clark* case." (Pet. App. 54a) The District Court determined that *Clark* was decided correctly based upon the District Court's thorough examination of New Mexico law. (Pet. App. 54a-55a).

The Tribes misrepresent the decision of the Tenth Circuit Court of Appeals by saying the Tenth Circuit held

that the State was entitled to make its own decision whether its assent to the compacts is valid or binding under New Mexico law, regardless of the Secretary's role. (Pet. 7). In fact, the Tribes conceded at oral argument that *Clark* resolved the state law issues and that the Court was required, absent extraordinary circumstances, to accept that determination. (Pet. App. 31a). Even with this concession, the Tenth Circuit still examined the *Clark* decision and stated that "[W]e agree with that decision." (Pet. App. 32a). Both the District Court and the Tenth Circuit Court of Appeals examined the *Clark* decision independently and both found that it was decided correctly. Neither Court said that they were bound by the New Mexico Supreme Court's decision.

The Tribes misrepresent the Tenth Circuit's ruling by stating that the Tenth Circuit found that the Secretary's role in approving compacts under the Indian Gaming Regulatory Act, 25 U.S.C. § 2701-2721 ("IGRA") was "ministerial." (Pet. 7). The Court below did not say that. What the Court of Appeals did say was the IGRA's requirement that a tribe enter into a compact with a state was separate from the Secretarial approval process. (Pet. App. 22a).

B. Background

Congress enacted IGRA in response to this Court's decision in *California v. Cabazon Bank of Mission Indians*, 480 U.S. 202 (1987). (Pet. App. 5a, n.3). Congress was searching for a way to regulate Indian gambling but it did not want to create a new federal responsibility. Congress found that Indian tribes should not regulate gambling

alone so Congress determined that it would rely upon the expertise of the states. Congress mandated that all Class III gambling be conducted under the terms and conditions of a compact entered into between each tribe and each state in which the tribe was located. 25 U.S.C. § 2710(d)(1)(C) (Pet. App. 82a).

Years before the compacts at issue were signed by the Tribes and New Mexico's Governor Gary Johnson, most of the Tribes began Class III gambling without compacts in clear violation of IGRA. (Pet. App. 7a and 42a). The United States Attorney for the District of New Mexico decided against taking enforcement action against the Tribes that had opened casinos in violation of IGRA (Pet. App. 8a and 43a) and unauthorized gambling has flourished ever since.

Forty-four days after taking office on January 1, 1995, Governor Gary Johnson entered into gambling compacts with thirteen New Mexico tribes, but only after the parties were forewarned that Governor Johnson did not have the authority to enter into compacts. (Pet. App. 26a, n.13).

After the Tribes and Governor Johnson signed compacts, the speaker of the New Mexico House of Representatives wrote to federal officials asking that the Secretary of the Interior not approve the compacts because Governor Johnson did not have the authority to enter into the compacts under New Mexico law. (Pet. App. 43a). Secretary Babbitt responded by saying that he was not going to determine complex issues of state law in reviewing compacts under IGRA but that "[W]e agree that compacts between Indian tribes and states are valid only if entered

into by the appropriate state officials." (Pet. App. 27a and 44a).

Secretary Babbitt approved the compacts and published his approval in the Federal Register on March 22, 1995. Immediately following the Secretary's approval, Governor Johnson's actions were challenged in an action before the New Mexico Supreme Court in the case of *State ex rel. Clark v. Johnson*, 120 N.M. 562, 904 P.2d 11 (1995). (Pet. App. 91a-126a).

The New Mexico Supreme Court ruled that Governor Johnson lacked the authority under the New Mexico Constitution to enter into gambling compacts pursuant to IGRA without legislative approval. In particular, the New Mexico Supreme Court ruled that the gambling activities that Governor Johnson was attempting to authorize contravened New Mexico public policy against wide-open commercial gambling. (Pet. App. 114a-115a). In an unrelated case, the New Mexico Supreme Court again found that casino-style gambling was against New Mexico's public policy and in violation of New Mexico's criminal laws. *Citation Bingo, Ltd. v. Otten*, 121 N.M. 205, 910 P.2d 281 (1995).

Only after *Citation Bingo* was decided did the United States seek to enforce the law. Threatened with closure by the United States, the Tribes sued Secretary Babbitt and other federal officials seeking a court declaration that their gambling activities were legal under IGRA. Specifically, the Tribes brought this action seeking a declaration of the validity of the Tribal-State gaming compacts they entered into with Governor Johnson. (Pet. App. 3a).

This case has reached this Court fifteen months after it was initiated in the District Court because all parties agreed that a final resolution of this dispute was needed quickly. In that spirit, the State requests that the Court deny the Tribes' petition as soon as possible.

ARGUMENT

The Tribes argue that the State of New Mexico must be bound to a compact which the State never entered into because the Secretary of the Interior approved the compact. The Tribes argue that the Secretary has the primary authority to determine compact validity. (Pet. 11). The Tribes' argument turns all known concepts of federalism and separation of powers on their heads and advocates a position that contravenes the Constitutions of the United States and the State of New Mexico.

1. It is fundamental that states retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere. *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991). If Congress does intend to preempt the historic powers of the states, such an intent must be made clear. *Will v. Michigan Department of State Police*, 491 U.S. 58, 65 (1989). The decision whether the governor or the state legislature should speak for a state is clearly one of those " . . . State decisions that 'go to the heart of representative government.' " *Gregory*, 501 U.S. at 461, quoting *Sugarman v. Doughall*, 413 U.S. 634, 647 (1973).

As the courts below observed, IGRA is silent on who is to speak for the state in negotiating and entering into

gambling compacts. Thus, Congress left to each state the decision as to who would enter into compacts. (Pet. App. 18a and 54a). Certainly, the duty imposed by IGRA to negotiate and enter into a compact with another sovereign is not the sort likely to be performed by state executive officers. *Seminole Tribe of Florida v. State of Florida*, ___U.S.___, 116 S.Ct. 1114, 1133, n. 17 (1996).

The New Mexico Constitution requires that the new Mexico legislature give its consent to any gambling compact entered into under IGRA. (Pet. App. 122a-123a). Thus, IGRA's requirement that a tribe must enter into a compact with a state for Class III gambling was not met because these compacts were not approved by the New Mexico legislature.

It is well settled proposition that when a state purports to bind itself, it must do so in accordance with its own constitution. In *West Virginia, ex rel. Dyer v. Sims*, 341 U.S. 22, 30 (1951), this Court said "[T]he issue before us is whether the West Virginia Legislature had authority, under her Constitution, to enter into a compact which involves delegation of power . . . " This Court has also found that when a state assumes jurisdiction over Indian land under an act of Congress, that assumption of power must be in accordance with state law. *Washington v. Confederated Bands and Tribes of the Yakima Indian Reservation*, 439 U.S. 463, 493 n.39 (1979).

Thus, the Courts below correctly decided that New Mexico had not entered into compacts with the Tribes because New Mexico's governor lacked the constitutional authority to bind the State to compacts.

2. The Tribes' argument that Secretary Babbitt should determine the validity of compacts is the opposite of what they argued in both the District Court and the Court of Appeals. This action was initiated in the District Court by the Tribes against Secretary Babbitt " . . . seeking a declaration of the validity of Tribal-State gaming compacts they had entered into with the State of New Mexico, under the . . . ("IGRA") . . . " (Pet. App. 3a). In response to the United States' argument that the Courts need not rule on compact validity, the Tribes argued in their reply brief to the District Court as follows:

> But by asserting that the Secretary can revoke his approval – an issue not presented by the facts of this case – by suggesting that the Secretary's approval does not apply to selected portions of the compacts, and by affirmatively asking this Court not to issue a ruling on the question of whether the compacts are valid, Defendants [United States] have attempted to mitigate the consequences of the compacts being in effect. Their position on these points is untenable.
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> Defendants [United States] attempt to raise an issue not presented by this case, that is, whether the Secretary has the authority to rescind his approval of a compact . . . [A]s noted, however, that issue is nowhere presented by the facts of this case. Record, Vol. VI, A1688 and A1693-94, n.4.

The interpretation of IGRA argued by the Tribes would allow a member of the federal executive branch to bind a state to a contract to which the state is not a party,

for the purpose of regulating Indian gambling. This would amount to the worst kind of coercion. To allow the Secretary to conscript a whole state to regulate Indian gambling runs afoul of the Tenth Amendment, because:

> States are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government . . . The Constitution instead "leaves to the several states a residuary and inviolable sovereignty," . . . reserved explicitly to the States by the Tenth Amendment. *New York v. United States*, 505 U.S. 144, 188 (1992) (citation omitted).

3. The Tribes' argument that the decision below represents a national disaster for tribes is untrue. First, IGRA is not a uniform statute. IGRA incorporates individual state laws and policies and individual tribal concerns in the compacting process. Each tribe is required to enter into compacts with the state in which it is located. 25 U.S.C. §2710(d)(1)(C). (Pet. App. 82a). Tribes may only engage in Class III gambling that is permitted by the state in which it is located. 25 U.S.C. § 2710(d)(1)(B). (Pet. App. 82). What gambling activities are allowed in Nevada will differ drastically from the gambling activities that occur in the neighboring State of Utah. Thus, the situation in New Mexico may have no relevance to any other state.

The situation in New Mexico is unique and does not necessarily implicate situations in other states where tribes have operated under state-tribal compacts for some time. As the courts below pointed out, most of the Tribes started their Class III gambling before they had compacts. (Pet. App. 7a and 42a). The Tribes were forewarned that

the compacts they were entering into with New Mexico's Governor may be invalid because the Governor lacked the authority to enter into compacts. (Pet. App. 26a, n.13). Secretary Babbitt warned all parties that the compacts would not be valid if the Governor lacked the authority to bind the State to compacts. (Pet. App. 27a and 44a).

Also, contrary to the Tribes' assertions, compacts are not subject to challenge by just anyone. (Pet. 8). Courts have dismissed cases challenging compacts when the person challenging the compact lacked standing. *Willis v. Fordice*, 850 F. Supp. 523, 529 (S.D. Miss. 1994); *Langley v. Edwards*, 872 F. Supp. 1531, 1533 (W.D. La. 1995).

4. The Tribes' argument that allowing challenges to federally approved compacts caused undue uncertainty for the Tribes cannot be used as a reason to override the doctrine of separation of powers. As this Court has said, "[C]onvenience and efficiency are not the primary objectives – or the hallmarks – of democratic government . . . " *I.N.S. v. Chada*, 462 U.S. 919, 944 (1983). On a practical level, the Tribes' argument that Secretary Babbitt can better handle these disputes between Tribes and States has not been demonstrated in this case. It has been almost two years since the New Mexico Supreme Court ruled that the Governor had no authority to enter into compacts. Since then, this litigation has progressed rapidly through the federal courts. During this period, Secretary Babbitt has not said whether or not he will withdraw his approval of the compacts. The courts have proven to be much more efficient in deciding these issues despite the fact that, as far back as April of 1995, Secretary Babbitt announced that compacts were not valid if they had not been properly executed by the State of New Mexico.

5. There is no conflict between the decision below and another circuit court that requires this Court to exercise its judicial discretion by granting Petitioners' Writ of Certiorari.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,
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